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NO. 57568-6-I

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

MICAH TIBBLES,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR ISLAND COUNTY

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The Honorable Vickie I. Churchill, Judge  
Superior Court Cause No. 05-1-00072-5  
District Court Cause No. C560932

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BRIEF OF RESPONDENT

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## **I. SUMMARY OF ARGUMENT**

The Trial Court's ruling does not conflict with State v. O'Neill, 148 Wn.2d 564 62, P.3d 489 (2003), because the court did not uphold the search as a search incident to arrest. The Trial Court instead found the search was justified by exigent circumstances. The exigent circumstances consisted of the lateness of the hour, the movable nature of the Appellant's vehicle, and that the Appellant was aware of the law enforcement officer's suspicions that marijuana was in his vehicle. Such circumstances presented a real possibility that evidence would be lost if the law enforcement officer had attempted to obtain a search warrant

## **II. ISSUES ON APPEAL**

Appellant sets forth three assignments of error in support of his appeal of the trial court's decision. Relying on three assignments of error, he asserts that there are three issues determinative of the case. Those issues are objectively stated as:

1. Whether the Superior Court's decision affirming the prearrest search of the Appellant's vehicle conflicts with the Washington State Supreme Court decision of State v. O'Neill, 148 Wn.2d 564, 62 P.2d 489 (2003)?
2. Whether the Trial Court erred in determining exigent circumstances provided authority of law to search the Appellant's vehicle prior to arrest?

3. Whether the Trial Court erred in concluding that the officer's suspicion that marijuana may be in the Appellant's vehicle justified the prearrest search under the "probable cause/exigency exception to the search warrant requirement?"

### III. STATEMENT OF THE CASE

Respondent's procedural and factual statement of the case is based upon the transcripts and written opinions of the District Court and Superior Court in this case.

On October 28, 2004, at 2355 hours, Trooper Norman Larsen stopped a vehicle driven by the Appellant for a defective left taillight. CP 49. The Appellant was the only one present inside the vehicle and Trooper Larsen smelled a strong odor of marijuana coming from the vehicle. Id. Trooper Larsen asked the Appellant to step out of the vehicle and advised him that he could smell the odor of marijuana emitting from the vehicle. Id. The Appellant denied having any marijuana. Id. Trooper Larsen then searched the Appellant but did not find any marijuana. Id. Trooper Larsen asked the Appellant if he had smoked any marijuana that day and the Appellant denied it. Id. Trooper Larsen then searched the Appellant's vehicle and recovered a brown paper bag containing a glass pipe and a glass container with suspected marijuana inside from under the front passenger seat. Id. 3. The Appellant was cited and released at the

scene and the evidence was transported to the Washington State Patrol evidence locker. Id. The evidence was subsequently analyzed by Scott Legler, a leaf technician for Washington State Patrol and determined to contain 6.6 grams of marijuana. Id.

The Appellant moved to suppress the evidence based on an unlawful search. Id. 1. The trial court denied the motion to suppress. The trial court found the Appellant guilty of unlawful possession of marijuana and possession of drug paraphernalia. Id.

The Appellant appealed the trial court's ruling to Superior Court. Island County Superior Court Judge Churchill found that out of the five circumstances identified by the courts as being exigent and justifying a warrantless search, mobility of the vehicle and mobility or destruction of the evidence applied to the current case. 2RP 4-6. The Superior Court affirmed the trial court's decision and found that the State proved exigent circumstances and the reasonableness of the warrantless search. Id. at 6-7.

#### **IV. ARGUMENT**

##### **A. The Superior Court Decision Is Consistent With Washington Decisional Law.**

The Appellant argues that the decision of the Superior Court is in conflict with the Washington Supreme Court decision State v. O'Neill, 148 Wn.2d 564 62, P.3d 489 (2003). Appellant Brief at 20-21.

In O'Neill, it was determined that a warrantless search incident to arrest must be preceded by a valid arrest. Id. at 501. Appellant relies on O'Neill for the proposition that the search was illegal because it preceded a custodial arrest. However, the trial court and RALJ courts did not find the search was valid as incident to arrest. The trial court instead found the legal basis for the search was provided by exigent circumstances. CP 46, 50. The trial court specifically addressed the holding in O'Neill and determined that although the search could not be justified as a search incident to arrest; sufficient exigent circumstance existed to justify the warrantless search. CP 46.

The defense argued per State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986), when there is probable cause and exigent circumstances, there should be an arrest to provide the lawful authority for the search. 1RP 13-14. The Superior Court examined O'Neill, and determined the search

could not be upheld as a search incident to arrest because there was no arrest. 2RP 4. The Superior Court did find the district court's decision was justified by evidence of exigent circumstances. Id. 6-7. Therefore, the defense's argument that there is a conflict between the Superior Court's decision and O'Neill is incorrect.

**B. The Trial Court Correctly Ruled That The Warrantless Search Was Justified By Exigent Circumstances.**

The Appellant's two remaining assignments of error are based on the same issue of whether the search of the Appellant's vehicle was justified by exigent circumstances. The Appellant argues that a valid search premised upon exigent circumstances can only be justified by "urgency, danger, and seriousness." Appellant Brief at 16. The correct justification for a search of a motor vehicle under exigent circumstances is set forth in Chambers v. Maroney, 90 S.Ct. 1975, 399 U.S. 42 (1970).

Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search . . . (A) search warrant (is) unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible. Id. at 1981.



As the Appellant concedes, the leading Washington state case concerning marijuana odor detected during a traffic stop is State v. Hammond, 24 Wn.App. 596, 603 P.2d 377 (1979). Appellant Brief at 12. In Hammond, the Court found probable cause for police to arrest and search an individual based on the odor of marijuana emitting from his automobile. The Court briefly discussed the different rationale applied in People v. Chestnut, 43 A.D.2d 260, 351 N.Y.S.2D 26 (1974), in which the New York Court allowed a search of a vehicle without an arrest based on exigent circumstance from the smell of marijuana and the fact that the vehicle's occupants had been alerted to the officer's suspicions. But the Washington Court indicated they would not examine whether exigent circumstances would apply because the officers already had arrested the Appellant and searched him incident to that arrest. Hammond at 600.

In State v. Huff, 33 Wn.App. 304, 654 P.2d 1211 (1982), the court followed identical reasoning and determined, that based on exigent circumstances, "a warrantless search is constitutionally permissible if there is probable cause to search the automobile which is stopped, the car is movable, the occupants are alerted and contents of the car may never be found again if a warrant must be obtained first." Id. at 310.

In the present case, Trooper Larsen contacted the defendant at a vehicle stop just before midnight. He smelled marijuana and confronted

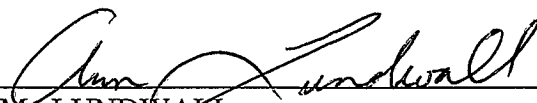
the defendant with his suspicions. The defendant denied possession of any marijuana and denied consuming any marijuana that day. CP 49. Trooper Larsen then had probable cause to believe marijuana was in the defendant's vehicle. The Superior Court found that the combined factors of the lateness of the hour, the movable nature of the defendant's vehicle, and that the defendant was aware of Trooper Larsen's suspicions presented a real possibility that evidence would be lost if Trooper Larsen had attempted to obtain a search warrant. 2RP 6-7. Substantial evidence supported both the trial court's and Superior Court's findings that sufficient exigent circumstances existed to justify the warrantless search.

**V. CONCLUSION**

For the reasons discussed herein, this Court should uphold the lower court's decision.

Respectfully submitted this 30 day of November, 2006.

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2. The Appellant was the only one present inside the vehicle and Trooper Larsen smelled a strong odor of marijuana coming from the vehicle. Id. Trooper Larsen asked the Appellant to step out of the vehicle and advised him that he could smell the odor of marijuana emitting from the vehicle. Id. The Appellant denied having any marijuana. Id. Trooper Larsen then searched the Appellant but did not find any marijuana. Id. Trooper Larsen asked the Appellant if he had smoked any marijuana that day and the Appellant denied it. Id. Trooper Larsen then searched the Appellant's

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<sup>1</sup> The Trial on Stipulated Fact; Entry of Judgment of March 31, 2005 will be referred to as "TSF;" Memorandum Decision of March 31, 2005 will be referred to as "MD;" the transcript of the December 7, 2005 hearing will be referred to as "1RP;" the transcript of the December 15, 2005 hearing will be referred to as "2RP."

vehicle and recovered a brown paper bag containing a glass pipe and a glass container with suspected marijuana inside from under the front passenger seat. Id. 3. The Appellant was cited and released at the scene and the evidence was transported to the Washington State Patrol evidence locker. Id. The evidence was subsequently analyzed by Scott Legler, a leaf technician for Washington State Patrol and determined to contain 6.6 grams of marijuana. Id.

The Appellant moved to suppress the evidence based on an unlawful search. Id. 1. The trial court denied the motion to suppress. The trial court found the Appellant guilty of unlawful possession of marijuana and possession of drug paraphernalia. Id.

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The defense argued per State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986), when there is probable cause and exigent circumstances, there should be an arrest to provide the lawful authority for the search. 1RP 13-14. The Superior Court examined O'Neill, and determined the search

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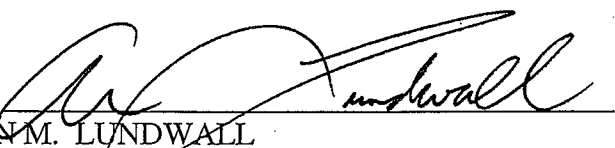
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#### V. CONCLUSION

For the reasons discussed herein, this Court should uphold the lower court's decision.

Respectfully submitted this 20 day of November, 2006.

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